No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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INDEX

TEXT BOOKS CITED

CASES CITED

CASES CITED—*Continued*

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APPELLEE'S "PRELIMINARY STATEMENT"

Counsel for the appellee commence their brief by quoting the original complaint in this action. From this it would appear that they have the idea that this case is to be determined upon the allegations of such original

complaint, thus ignoring the decision of the Supreme Court in *Washer v. Bullitt County,* 110 U. S. 558, 28 L. ed. 249, which we cited upon page nineteen of our opening brief. The counsel for the appellee seem to disagree with the Supreme Court when it said of litigants who were standing upon their amended petition:

> "They were not inexorably bound by the averments of the original petition. When a petition is amended by leave of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition."

To apply the above quotation to the present case, we have only to substitute "second amended complaint" for "amended petition" and "appeal" for "writ of error," and then we would have the following as the law of this case:

> "It was upon the seconded amended complaint that the judgment of the court below was given, and the question brought here by this appeal is the sufficiency of the second amended complaint."

QUESTION INVOLVED

The "question involved" as submitted by counsel for the appellee contains some somewhat weird statements. For instance, the statement that "the first vehicle containing the defective axle has come to rest in a *normal* and lawful manner." (Italics ours.) It is a rather far fetched statement to say that a truck while being oper-

ated upon a much travelled highway on a wintry night and coming to rest upon a bridge on account of a broken axle actually came "to rest in a normal manner."

Furthermore, the appellee's question contains the astonishing statement that the vehicle containing the appellants as passengers "without any mitigating circumstances being alleged, comes into collision with the rear of the lawfully stopped vehicle." Here counsel for the appellee overlooks the allegation of the second amended complaint that the car in which the appellants were passengers was being driven "in a careful and prudent manner," and also that the collision and the resulting damages to the appellants occurred "as the result of the negligence of the said defendant." It being the admitted facts of this case that the car in which the appellants were riding was being driven "in a careful and prudent manner," (which, of course, means without any negligence whatsoever) there is no necessity of alleging any "mitigating circumstances."

APPELLEE'S "STATEMENT OF FACTS"

The appellee's statement of facts omits various very important allegations of the second amended complaint. For instance, it omits the allegation (R. 44) that "there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the

said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth."

The appellee's statement of facts also omits the allegation that the car in which the appellants were passengers came into violent collision with the said truck *while it "was being driven in a careful and prudent manner"* (R. 46).

Furthermore, the statement that no facts are alleged which explain how the appellants' automobile happened to collide with the truck is a rather startling statement in view of the allegations of the second amended complaint that the truck became disabled and unable to proceed on a bridge on the Pacific Highway on a wintry night and the car in which the appellants were passengers, and which was being driven in a careful and prudent manner, came into violent collision therewith (R. 46). Just what other facts are necessary it would be a somewhat difficult matter to determine. In other words, it plainly appears from the complaint that while the appellants were passengers in a car being driven in a careful and prudent manner across a long bridge on a much travelled highway upon a wintry night, suddenly a disabled truck looms up in front of them, that without any intervening cause other than the immovability of the truck and the momentum of the appellants' car, a violent collision ensues. Just what other facts could be alleged we are unable to discover.

APPELLEE'S CLAIM THAT "IT OWES NO LEGAL DUTY TO THE APPELLANTS"

Counsel for appellee are compelled to admit that, under the precedents, manufacturers owe a duty to the general public to use due care to manufacture reasonably safe parts of an automobile, such as wheels:

MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050;

Johnson v. Cadillac Motor Car Co., 261 Fed. 878;

Martin v. Studebaker Corp., 102 N. J. L. 612, 133 Atl. 384.

Brakes:

Rotche v. Buick Motor Co., 358 Ill. 507, 193 N. E. 529;

Quackenbush v. Ford Motor Co., 153 N. Y. Supp. 131.

Body:

Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047.

Steering wheel:

Goullon v. Ford Motor Co., 44 F. (2d) 310.

Glass Windshield:

Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409.

but appear to be of the opinion that because none of these accidents resulted from a defective axle, there is no

law requiring that a manufacturer of axles should use reasonable care to see that such axles are reasonably safe. In other words, wheels must be safe, brakes must be safe, steering apparatus must be safe, but anything can be foisted on the public in the form of an axle which the public can be induced to buy.

In spite, however, of the immunity in favor of the manufacturer of defective axles suggested by counsel for the appellee, such immunity was denied in *Kalinowski v. Truck Equipment Co.*, 261 N. Y. S. 657.

In other words, counsel for appellee appear to claim that the statement of Judge Cardozo in the MacPherson case to the effect that, "Unless its wheels were sound and strong, injury was almost certain," was to be applied only to wheels and could not be extended to the axle which connects the wheels with the balance of the truck, and must sustain the full weight of the truck and therefore, under the appellee's claim the statement "unless its wheels were sound and strong, injury was almost certain," could not be extended to include the statement, "unless its axles were sound and strong, injury was almost certain."

We note that the case of *Hudson v. Moonier,* 94 F. (2d) 132, has been reversed by the Supreme Court of the United States, in *Hudson v. Moonier,* 304 U. S. 397, 82 L. Ed. Adv. Sheets 986, 58 S. Ct. 954, but the reversal was based upon the rule that "the court should have applied the law of Missouri where the injury occurred," and not because the Supreme Court disagreed with the de-

cision as a rule of general law. The alleged negligence in that case as stated by the Supreme Court consisted of a lessor's failure to equip a truck with a horn or other signaling device, a lack which was plainly apparent to the lessee and the driver. The fact, however, that the rule in Missouri in such a case is that a lessor owed no duty to the public to see that a rented truck was equipped with a proper horn, can not be binding upon this court in deciding a case arising out of an accident which occurred in the State of Washington. The rule in the State of Washington is in accord with the general rule.

Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409;

O'Toole v. Empire Motors, Inc., 181 Wash. 130, 42 P. (2d) 10.

Counsel for appellee further appear to claim (their br. p. 11) that negligence in manufacturing and selling a defective axle should be treated in the same way as the designing of an automobile so as to have the door hinged at the rear instead of the front, and as to the size, shape and position of the handle and catch. To baldly state such a proposition is to show its utter ridiculousness. The writer of the opinion in *Amason v. Ford Motor Co.*, 80 Fed. (2d) 265, in reference to the cases which we have already cited, said:

> "It was held that a manufacturer owed a duty to the public to use ordinary care in inspecting the parts of a motor vehicle before putting it on the market, so that if an accident was caused by the breaking of a defective part, in the ordinary use of

the vehicle, the manufacturer would be liable for negligence if he had failed to properly inspect the car before selling it,"

On pages 12 and 13 of appellee's brief, we find the astonishing doctrine advanced that there is no responsibility upon anyone to see that an automobile is in condition to go through with a prospective trip without breaking down. Such an idea is contrary to the very fundamental idea of law on the subject of automobiles:

> "The owner or driver of a motor vehicle must exercise reasonable care, in the inspection of his machine, to discover any defects that may prevent its proper operation, and to see that it is in such condition, as to equipment and safety appliances, that injuries to others using the highway will not result from defects in such equipment."
>
> Blashfield Cyclopedia of Auto. Law & Practice, Perm. Ed. Vol. 2, p. 1, §821.

> "Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers."
>
> Huddy, Cyc. of Auto. Law, 9th Ed., Vol. 3-4, p. 127, §71.

> "In the operation of their truck, hauling a heavy load over a mountainous road, they were under a duty to have it properly equipped for such service."
>
> *Graves v. Mickle,* 176 Wash. 329, 333, 29 P. (2d) 405.

"A motor vehicle is a complicated piece of mechanism, and some part of it may give way and cause it to stall, no matter what degree of care the operator may have exercised to keep it in proper condition. But the operator must exercise a reasonable degree of care to keep it in proper condition, and it is a want of such care to permit it to stall for want of a sufficient supply of gasoline."

Keller v. Breneman, 153 Wash. 208, 211, 279 P. 588.

The reason for the above rule is that everyone knows that a defective auto on the highway is a menace to the general public and everyone is bound to use due care to see that his negligence does not cause such a menace.

Counsel for appellee further appear to be of the opinion that merely because the truck in question did not run off the bridge or turn over, resulting in the maiming or killing of its driver, the responsibility for any other kind of an accident could not be ascribed to it. It is true in this case that the driver of the truck succeeded in bringing the truck to a standstill without injury either to the truck or to himself, but "before it could be removed from the said highway" the following car, which was being driven in a prudent and careful manner, came into collision with it. There can be no question but what a disabled truck standing upon a much travelled highway on a wintry night is a menace to the travelling public, and it is only common sense that the party who is directly responsible for such menace should be called upon to respond for the damages which proximately result therefrom.

We agree with the writer of the opinion in the case of *Cohen v. Brockway Motor Truck Corp.,* 268 N. Y. S. 545,

> "We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' "

Most certainly an axle, intended for use on a heavy truck, which is so defective that, while being normally used, it breaks after only ten weeks of use is well defined "a thing of danger."

Again, on page 17 of appellee's brief, appears the claim that this breakdwown was "a definitely normal and usual breakdown." In all the cases in appellate courts relating to automobile accidents, we note but one case, that of *Kalinowski v. Truck Equipment Co.,* 261 N. Y. S. 657, which resulted from a defective axle. To say that such a breakdown is "a definitely normal or usual breakdown" is rather a broad statement. On the contrary, such a breakdown is so rare that it is evident that with proper care in manufacture, it could not happen.

The case of *Foster v. Ford Motor Co.,* 139 Wash. 341, 246 P. 945, is not in point here at all, for as appears from the extended quotation contained in appellee's brief in that case, the manufacturer put out the article "with notice to the purchaser of its limitations, restrictions, or defects." The Supreme Court of the State of Washington expressly recognized in that case, however, the rule laid down in *Olds Motor Works v. Shaffer,* 145 Ky. 616, 140 S. W. 1047, that "the manufacturer of certain articles in-

tended for general use owes what may be called a public duty to every person using the articles to so construct them as that they will not be unsafe and dangerous, and for a breach of this duty, the manufacturer, within the limitations we will point out, is liable in an action for tort—not contract—to third persons who are injured by his breach of duty."

The distinction made by the Supreme Court of Washington between the rule which it applied in the Foster case and the rule for which we contend is set out in the last sentence of the quotation from the Foster case, on page 22 of appellee's brief:

> "But even when this is shown, the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it."

Any claim that the Morrison Mill Company, the purchaser of this defective axle, had any notice or knowledge of the defect, was expressly negatived in paragraph V of the second amended complaint.

At the foot of page 22 of appellee's brief, we find the astonishing statement:

> "No person could reasonably be fooled into thinking that his automobile was so perfectly constructed that the manufacturer impliedly represented to him that it would never be necessary to stop upon any highway because of a mechanical imperfection."

The allegations of paragraph V of the second amended complaint is that the appellee, "advertised and represented to the public that the said axle was of chrome steel

and was a suitable, safe and proper axle to be installed and used in such trucks as the truck of said Morrison Mill Company." To say that the Morrison Mill Company ought not reasonably to be fooled into thinking that this axle would last more than ten weeks of ordinary use is rather a surprising statement.

We respectfully submit that in spite of claims of counsel for appellee in their conclusion on page 27 of their brief, the second amended complaint alleged facts which prove conclusively that this defective axle created an eminently dangerous situation, and one that was not only reasonably foreseeable, but which was bound to happen if only the defect came to its logical conclusion while the truck was being operated on a wintry night on a much frequented highway. Also, while automobiles do fail mechanically, such failures do not just happen, but are the results of somebody's carelessness.

APPELLEE'S CLAIM OF CONTRIBUTORY NEGLIGENCE

Counsel for appellee claim that the appellants are guilty of contributory negligence as a matter of law. They begin this argument with quoting a rule found in 87 A. L. R. 900, at 901, to the effect that it is negligence as a matter of law for one to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the range of his vision ahead. This rule has been expressly repudiated by the Supreme Court of the State of Washington in the *en banc*

decision in the case of *Morehouse v. Everett,* 141 Wash. 399, 252 P. 157, wherein the court said regarding this rule:

> "The rule contended for is, in our opinion, entirely too broad, and, if put in effect, would have very serious and unjust results. It loses sight of the fact that one driving at night has at least some right to assume that the road ahead of him is safe for travel, unless dangers therein are indicated by the presence of red lights; it does not take into consideration the fact that visbility is different in different atmospheres and that at one time an object may appear to be one hundred feet away, while at another time it will seem to be but half that distance; it fails to consider the honest error of judgment common to all men, particularly in judging distances at night; it loses sight of the fact that the law imposes the duty on all autos traveling at night to carry a red rear light and the duty on all persons who place obstructions on the road to give warning by red lights or otherwise; it fails to take into consideration the glaring headlights of others and the density of the traffic, and other like things which may require the instant attention of the driver; it does not take into consideration that a driver at night is looking for a red light to warn him of danger and not for a dark and unlighted auto or other obstruction in the road." (p. 408)

Also, in *Devoto v. United Auto Transportation Co.,* 128 Wash. 604, 609, 223 P. 1050, the Supreme Court of the State of Washington said:

> "It is urged that there was error in instructing the jury to the effect that it was the duty of the driver of the stage to drive at such a rate of speed as to en-

able him to stop within the distance disclosed to his view by his own headlights. In view of the evidence in this case, we fear the rule laid down is so severe as to be impracticable. One of the respondents testified to the effect that the fog lay in banks or strips, in places not so dense as to interfere with a reasonable view ahead, but proceeding, they came into places where the fog was so dense that the white light of the headlights was mirrored back to the driver and he could see nothing in advance of his automobile. Under such conditions, shall a driver stop in the fog bank until the fog clears? If one does so, all must do so, or the danger would be thereby increased and if all stop, how shall anyone reach his destination? It seems to us in reason that traffic must be permitted to move on the highway at all times, but that, in driving through a fog bank, each driver must do so in a careful and prudent manner with due regard for the safety of others, and what is careful and prudent under the particular conditions shown will usually be a question for the jury" (pp. 609, 610).

It thus clearly appears that the rule laid down in the beginning of the argument of counsel for appellee on this point is not the rule followed by the Supreme Court of the State of Washington, and under the recent decision of the Supreme Court of the United States the Federal Courts are bound to follow the rules of law laid down by the courts of the state in which the cause of action arose. In *Hudson v. Moonier,* 304 U. S. 397, 82 L. Ed. Adv. Sheets 986, 58 S. Ct. 954, the court used the following language:

"Respondent brought this suit to recover damages

for personal injuries alleged to be due to the defendants' negligence. * * *

"Judgment against both defendants was affirmed by the Circuit Court of Appeals. The court treated the question of the liability of the lessor as one of general law. The court should have applied the law of Missouri where the injury occurred. *Erie R. Co. vs. Tompkins,* decided April 25, 1938. (304 U. S. 64 ante, 787, 58 S. Ct. 817, 114 A. L. R. 1487.)"

The Supreme Court of Washington, having definitely repudiated the rule that a driver must in all cases be able to stop within the range of his own lights, there is nothing in this case to negative the allegation that the appellants' car was being driven in a careful and prudent manner.

APPELLEE'S ACTS WERE THE LEGAL AND PROXIMATE CAUSE OF APPELLANTS' INJURIES

There was absolutely nothing novel or abnormal about this accident other than the negligence of the appellee in manufacturing and selling this latently defective axle. Such an axle is bound to break without warning. The truck was being used in a perfectly normal and to be expected manner. The breakdown of the truck under the conditions existing (which must be anticipated) was quite likely to be followed by a collision with the car immediately following it with resulting damage. There was nothing about this accident which the appellee was not under a legal duty to foresee as a probable result of its manufacturing and selling a latently defective axle.

ASSIGNMENT OF ERROR NO. 2

Appellee again on page 35 of its brief refer to the allegations of the original complaint, entirely ignoring the rule which we have heretofore shown that the question brought here is the sufficiency of the second amended complaint. Under the authority of *Washer v. Bullitt County,* 110 U. S. 558, 28 L. Ed. 249, it was within the power of the appellants to withdraw any allegations of the complaint "without assigning reasons for the withdrawal."

We therefore respectfully submit that the question brought here is the sufficiency of the second amended complaint, that it is sufficient, that the demurrer to it should have been overruled and the motion to strike it denied, that the order of the District Court should be reversed, and the District Court ordered to proceed with the case.

Respectfully submitted,

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